No. 48801-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

IAN AND KERI SCHUMACHER,

Plaintiffs/Respondents,

v.

T. GARRETT CONSTRUCTION INCORPORATED,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

LINVILLE LAW FIRM PLLC

David E. Linville, WSBA #31017
Linville Law Firm, PLLC
Attorneys for T. Garrett Construction Incorporated
800 Fifth Ave. Ste. 3850
Seattle, WA 98104
206-515-0640
dlinville@linvillelawfirm.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other State Cases

Court Rules

Secondary Sources

A. ASSIGNMENT OF ERROR

The Schumachers argue that "the Court cannot consider any error in the trial court's judgment" because TGC did not assign error to the judgment. (Resp. Brief, p. 1).

This same argument was made and rejected in *Pannell v. Food Servs. of Am.*, 61 Wn. App. 418, 427, 810 P.2d 952 (1991).

> The Managers argue that Tradewell failed in its brief to properly assign error to the judgments pursuant to RAP 10.3(a)(3)[1] and RAP 10.3(g). Tradewell responds that it properly assigned error to the trial court rulings in its notice of appeal and that RAP 10.3 only requires a brief to separately assign error to instructions and findings of fact, not judgments.
>
> * * * *
>
> An examination of Tradewell's brief indicates that RAP 10.3(a)(3) was complied with. Tradewell is correct in arguing that RAP 10.3(g) requires only that errors concerning instructions and findings of fact must be separately set forth in the brief. In addition, the instant notice of appeal designates the judgment . . . It appears that Tradewell has properly complied with the Rules of Appellate Procedure.

Pannell, 61 Wn. App. at 427.

TGC's Notice of Appeal designates the judgment from which it is appealing. (CP 114). TGC's Opening Brief assigns error to each conclusion of law that it challenges. TGC complied with the rules.

---

[1] Subsequent to the *Pannell* case decided in 1991, former RAP 10.3(a)(3) was renumbered to RAP 10.3(a)(4).

Even if TGC were required to assign error to the judgment identified in its Notice of Appeal, technical noncompliance is permissible as the rules favor substance over form. RAP 1.2(a); *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

B. CAVEAT EMPTOR

The Schumachers argue that the doctrine of caveat emptor does not apply in the context of the sale of a new residential dwelling by a builder-vendor. (Resp. Brief, p. 2.). To the contrary, caveat emptor applies to the sale of all residential dwellings by builder-vendors, subject to the exceptions of fraudulent concealment and the implied warranty of habitability. Every Washington case in which a court has stated that the doctrine of caveat emptor is inapplicable to that particular case involves the application of one of the exceptions to caveat emptor, such as fraudulent concealment or implied warranty of habitability. Here, the implied warranty of habitability exception does not apply, because the trial court ruled that TGC's construction defects were not serious enough to result in a breach the implied warranty of habitability. This is no different than stating that where an exception to a general rule applies, the general rule is inapplicable.

The Schumachers cite *Westlake View Condo. Ass'n. v. Sixth Ave. Partners, LLC*, 146 Wn. App. 760, 193 P.3d 161 (2008) for the proposition that the doctrine of caveat emptor has been abandoned by the courts. (Resp. Brief, pp. 2-3). In *Westlake*, the court stated: "Washington has followed *Carpenter* in abandoning the doctrine of caveat emptor as applied to the sale of new residential dwellings by builder-vendors and in recognizing an implied warranty." *Id.* at 767.

The court in *Westlake* did not "abandon" the doctrine of caveat emptor. The Schumachers are taking the quoted line out of context. The court in *Westlake* recited the history of the common law doctrine of caveat emptor and Washington's landmark decision *House v. Thornton*, 76 Wn.2d 428, 457 P.2d 199 (1969) in which the implied warranty of habitability was first adopted in Washington. *Westlake*, 146 Wn. App. at 766-69. Washington's adoption of the implied warranty of habitability in 1969 did not result in abandonment or abrogation of caveat emptor. It resulted in the abandonment of caveat emptor as applied to serious defects compromising the habitability of a new home, but not to the abandonment of caveat emptor as to less serious defects. The court stated: "The implied warranty of habitability does not cover alleged defects that involve **mere defects in workmanship** or aesthetic concerns." *Westlake*, 146 Wn. App. at 770 (Emphasis added).

Westlake is just one of many cases where the construction defects at issue were serious enough to breach the implied warranty of habitability resulting in caveat emptor not applying. In *Westlake* and in other cases where the implied warranty of habitability was breached, the general rule (caveat emptor) did not apply, because an exception (implied warranty of habitability) applied.

If the doctrine of caveat emptor were indeed abandoned as the Schumachers claim, our Supreme Court would never have stated in *Stuart v. Coldwell Banker Comm'l Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987) that:

> Beyond the terms expressed in the contract of sale, the only recognized duty owing from a builder-vendor of a newly completed residence to its first purchaser is that embodied in the implied warranty of habitability.

The Schumachers argue that TGC does not "cite any Washington authority for the proposition that caveat emptor remains the default rule in this State." (Resp. Brief, p. 3). Yet, the only cases cited by the Schumachers in support of their argument (that the doctrine of caveat emptor has been abrogated) are cases where the implied warranty of habitability was breached.

The rule in Washington contrasts with the rule in Utah, where a contractor who builds and sells a new residential dwelling is subject to not

only an implied warranty of habitability to the first buyer, but also an implied warranty of workmanship. *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234 (Utah 2009) (adopting an implied warranty of *workmanship* in the sale of a new residential dwelling by a builder-vendor, and overruling prior Utah decisions that had held that a builder-vendor was subject only to the implied warranty of *habitability*). In States such as Utah, the doctrine of caveat emptor has been abrogated in the sale of new residential dwellings by builder-vendors because the imposition of an implied warranty of workmanship effectively negates caveat emptor. Concededly, if TGC had built and sold this house to the Schumachers in Utah, the Schumachers would have a cause of action against TGC for construction defects not serious enough to trigger the implied warranty of habitability (such as the defects in the Schumachers' garage and the kitchen) under an implied warranty of workmanship. But in Washington, the law maintains a distinction between the implied warranty of habitability and the implied warranty of workmanship, recognizing a cause of action for the former but not recognizing a cause of action for the latter.

C. STONE DEFECTS

Concerning the improperly installed stone on the garage wall, the Schumachers argue that although they may not be entitled to damages under an express or implied warranty, they are entitled to damages under a theory of breach of contract. (Resp. Brief, pp. 5-6).

This is the first time that the Schumachers have ever asserted this argument. In their Complaint, they alleged breach of contract, but only as to items that they believed that they were contractually entitled to, but allegedly did not receive. (CP 4). Paragraph 20 of their Complaint states:

> Defendant breached its agreement with Plaintiffs by failing to provide all items identified in the agreement and the contractor's spec sheet, as well as some of the items paid for as upgrades.

(CP 4). As to the construction defects, the Schumachers alleged in their Complaint only breach of warranty theories. (CP 4-6). The Schumachers consistently maintained this position through trial. The "breach of contract" section in their trial brief is devoted only to items that they allege were promised, but allegedly never received. (CP 40-44). Their trial brief asserts breach of warranties for the alleged construction defects. (CP 44-51). The Schumachers' damages list distinguishes between their damages for construction defects (first page) and their damages for items not received (second page). (Ex. 30).

Now that the Schumachers can no longer assert breach of *warranty* to recover damages for construction defects (COLs 1-3), the Schumachers are asserting for the first time on appeal that the construction defects at issue form the basis of a breach of *contract* claim. The Court should not consider an argument raised for the first time on appeal. RAP 2.5(a).

Even if the Court considers this new argument, it should be rejected. A breach of contract occurs when a party to a contract fails to comply with a specific term of the contract. *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 364, 366, 853 P.2d 484 (1993). TGC did not breach any specific term of the contract. The Schumachers are unable identify any term of the contract that was breached.

The Schumachers identify only one place in the REPSA that references stone on the garage wall. The Schumachers correctly point out that Exhibit B in the REPSA and its preceding page (16th and 17th pages of the REPSA) require stone to be installed in certain designated areas around the exterior of the garage. (Resp. Brief, p. 6-7).

There was no breach of contract. TGC installed the stone in those designated areas. Concededly, there would have been a breach of contract if TGC had not installed the stone at all or if TGC had installed the stone, but in the wrong areas.

That the stone was installed improperly by TGC is not a breach of contract. The Schumachers confuse breach of contract with breach of a workmanship warranty. In *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 853 P.2d 484 (1993), a construction contractor (G.W.) contracted with a company (PSI) to inspect the locations of rebar that G.W. had placed in concrete in a building. *Id.* at 362. The parties' contract obligated PSI to "provide required rebar inspection". *Id.* PSI inspected G.W.'s rebar placement in the concrete. PSI found that G.W.'s rebar placement in the concrete was proper. *Id.* Subsequently, cracks started appearing in the concrete. *Id.* It was later determined by a third party that G.W. had misplaced the rebar and that PSI's inspection was not properly done. *Id.* at 363. G.W. filed a lawsuit against PSI for failing to detect that rebar was not in the proper locations in the concrete. *Id.* G.W.'s complaint asserted breach of contract and negligence. *Id.* The trial court ruled that PSI breached the contract. *Id.* at 365. The Court of Appeals reversed. The Court of Appeals determined that PSI was contractually obligated to inspect the rebar. However, PSI was not contractually obligated to inspect the rebar skillfully or properly. *Id.* at 365. The contract merely obligated PSI to perform the inspection. PSI performed the inspection. The issue was whether there was "a breach of a

specific term of the contract". *Id.* at 364. G.W. could not identify any term of the contract that was breached. The court stated:

> A failure to perform the inspections which PSI agreed contractually to perform would be a breach of contract. A failure to exercise the necessary degree of professional engineering care in doing so would not, unless the omission violated a specific contractual undertaking. By analogy, an attorney who agrees to draft a will for a client breaches a contract with the client by failing to do so. However, if the attorney drafts the will and negligently omits having its execution properly witnessed, the attorney would be liable in tort for professional malpractice. No breach of contract action would lie even though the will would not be valid if its execution were not witnessed.
>
> * * * *
>
> In fact, the rebar was misplaced, but the inspectors' failure to determine that was not a breach of a specific term of their contract.

G.W. Constr. Corp., 70 Wn. App. at 366.

As was the case with the plaintiff in *G.W. Constr. Corp.*, the Schumachers cannot identify a specific term of the contract that was breached.

The Schumachers cite *Graoch Assocs. #5 Ltd. P'ship v. Titan Constr. Corp.*, 126 Wn. App. 856, 109 P.3d 830 (2005). In *Graoch*, the plaintiff prevailed on its breach of contract claim because it identified a specific term of the contract that was breached, namely, the contract stated "that all Work will be of good quality, free from faults and defects". *Id.* at 859.

The Schumachers cite *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 10 P.3d 417 (2000) for the proposition that a breach of contract occurs if materials are improperly installed. (Resp. Brief, p. 8). *Panorama* does not stand for that proposition. In *Panorama*, the trial court ruled that "the roofing materials were not installed in accordance with the contract and manufacturer's specifications." *Id.* at 424. In *Graoch*, the court stated that the contract in *Graoch* as well as the contract in *Panorama* both contained terms requiring the contractor's work to be of good quality and free of defects. *Graoch Assocs. #5 Ltd. P'ship*, 126 Wn. App. at 864 ("[Plaintiff has a] separate claim under *Panorama* for breach of the contractual requirement that Purcell's own work will be of good quality and free from defects."). In both *Graoch* and *Panorama*, specific contract terms in those cases were breached, resulting in those plaintiffs prevailing on their breach of contract claims.

Here, however, there was no contract term that was breached. The REPSA did not provide that the stone would be installed in any particular manner or to any particular standard, such as in accordance with manufacturer's specifications. If the REPSA had set forth a standard for the installation of the stone, then the Schumachers could have a cause of cause of action for breach of contract.

The Schumachers argue at length in their brief that the implied warranty of habitability is not their exclusive remedy and that they also are entitled to assert breach of contract. (Resp. Brief, pp. 9 -12). TGC agrees. Indeed, that is what our Supreme Court stated in *Stuart v. Coldwell Banker Comm'l Group, Inc.*:

> **Beyond the terms expressed in the contract of sale**, the only recognized duty owing from a builder-vendor of a newly completed residence to its first purchaser is that embodied in the implied warranty of habitability.

109 Wn.2d 406, 417, 745 P.2d 1284 (1987) (Emphasis added). The Schumachers, as a party to a contract, were entitled to assert a breach of contract claim. But to prevail, they must meet all of the elements. While they may have satisfied the element of damages, they cannot satisfy the element of breach.

The Schumachers appear to be arguing that if they can establish damages for improper installation, it follows that there was a breach of contract. (Resp. Brief, pp. 6-8). But damages and breach are two independent elements of a contract action. *Lehrer v. DSHS*, 101 Wn. App. 509, 516, 5 P.3d 722 (2000) ("plaintiff in a contract action must prove a valid contract between the parties, breach, and resulting damage.").

The Schumachers argue that the their "expectation interest" is relevant to determine their damages. (Resp. Brief, p. 6). TGC agrees. However, their expectation interest is not relevant in determining whether a breach of contract occurred. Both cases cited by the Schumachers concerning a party's expectation interest concern establishing the element of damages. (Resp. Brief, p. 6). The Schumachers fail to cite any authority stating that a party's expectation interest is relevant in determining whether a breach of contract has occurred.

D. KITCHEN DEFECTS

The Schumachers are not entitled to any damages concerning construction defects in their kitchen for the same reasons that they are not entitled to damages for the stone on the garage wall. TGC incorporates by reference here the arguments made above.

E. CEDAR FENCE

Concerning the cedar fence, there are three questions to be addressed. First, were the Schumachers contractually entitled to a cedar fence? If so, was this contractual obligation breached? In the alternative, did the Schumachers nonetheless waive their contractual right to a cedar fence? For the Schumachers to prevail on appeal concerning the cedar fence, all three questions must be answered in their favor. Stated

differently, if any one of these three questions is answered in favor of TGC, the Schumachers are not entitled to any damages concerning the cedar fence.

1. Were the Schumachers contractually entitled to a cedar fence? No

The Schumachers argue that there was a contractual obligation concerning a cedar fence. (Resp. Brief, pp. 14-15). The word "fence" is not in the contract. (Ex. 1). The trial court recognized that the contract was silent about a fence: "the language of the contract and the specs, it doesn't say fence." (RP Oral Decision 02/11/16, p. 19, lines 11-12). Not only does the word "fence" not appear in the contract, but there is no visual representation or depiction of a fence in the contract. (Ex. 1).

The word "fence" appears only in the sales flyer (Ex. 8) and the MLS listing ad (Ex. 9), both of which refer to a "cedar fence". Those documents are not part of the contract. Both pre-date the contract. (FOF 5, 7). They were not incorporated by reference into the contract and were both superseded by the contract by operation of the contract's integration clause. (FOF 13, COLs 9-10).

The Schumachers point out that the "Counteroffer Addendum" on the 16th page of the REPSA references an "exhibit B" and that the following page (17th page of the REPSA) contains a copy of the sales

flyer. (Resp. Brief, p. 15). The Schumachers appear to be arguing that they are therefore contractually entitled to all items stated in the sales flyer, including the cedar fence. The Schumachers are mistaken. The Counteroffer Addendum does not incorporate by reference all of the terms of the sales flyer. The sales flyer was attached to Exhibit B for a limited purpose, namely, to identify the areas where the stone would be installed with hand-written circles. The Counteroffer Addendum provides: "All terms and conditions of the [REPSA] are accepted, except for the following changes . . .". (Ex. 1). The Counteroffer Addendum goes on to list three changes. One of those change is designating the locations of the masonry stone on the garage wall. (Ex. 1).

Incorporation by reference must be clear and unequivocal. *Santos v. Sinclair,* 76 Wn. App. 320, 325, 884 P.2d 941 (1994). "It must be clear that the parties . . . assented to the incorporated terms." *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000). The burden of proving incorporation by reference is on the party claiming it. *State v. Ferro*, 64 Wn. App. 195, 198, 824 P.2d 500 (1992). Incorporation by reference can involve incorporating an entire document or it can involve reference to a document for a special purpose only. **"Where incorporated matter is referred to for a specific purpose only, it becomes a part of the contract for such purpose only,**

and should be treated as irrelevant for all other purposes." *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. at 499 (quoting 11 Samuel Williston, The Law of Contracts § 30:25, at 238) (Emphasis added).

Here, by its very terms the Counteroffer Addendum incorporates by reference the sales flyer for the special (and only) purpose of designating the areas where the stone and the porch would be installed. The Counteroffer Addendum states that the only changes being made to the REPSA are the three changes listed below. (Ex. 1).

This interpretation is consistent with the trial court's statement in its oral ruling that the contract is silent concerning a fence. (RP Oral Decision 02/11/16, p. 19, lines 11-12). If the terms in the sales flyer were part of the REPSA, then the contract would not be silent concerning a fence. Also, this interpretation is consistent with Conclusions 9 and 10, unchallenged, which state that the sales flyer was not part of the contract, but was in fact superseded by the contract's integration clause.

In summary, the contract did not obligate TGC to build a fence, much less a cedar fence. The Schumachers cannot identify a specific term in the contract that was breached. The trial court apparently believed (ignoring the contract) that the Schumachers deserved a new cedar fence that was not a split-rail fence. It was improper for the trial court to

impose this obligation (to build a cedar fence that was not a split-rail rence) on TGC when it was not in the contract. "The court cannot impose obligations between the parties that never existed." *King v. Bilsland,* 45 Wn. App. 797, 800, 727 P.2d 694 (1986).

2. If the Schumachers were contractually entitled to a cedar fence, was this contractual obligation breached? No.

Arguing in the alternative, even if the Schumachers were contractually entitled to a cedar fence, there was no breach of contract because the Schumachers got a cedar fence. In purchasing the property, the Schumachers received a new pre-stained wood fence built by TGC located in the front and sides of their house as well as a pre-existing split-rail cedar fence (not built by TGC) in the back of their house. (Ex. 49, photos H, I, and J; Ex. 76 photos 1, 5).

The Schumachers argue that TGC "fails to establish whether the split rail cedar fence is located on [their] property or on the adjacent environmentally sensitive area." (Resp. Brief, p. 15). The trial court found that "there was an existing split-rail cedar fence that separated the Schumachers' back yard from the neighboring property." (FOF 8). Implicit in this finding is that the cedar fence is located on or contiguous with the border of the Schumacher's property. In this circumstance, the Court should decline to treat the absence of a finding (clearly stating that

the cedar fence is located on the Schumachers' property) as the presumptive equivalent of a negative finding. *Douglas N.W., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 682, 828 P.2d 565 (1992) (holding that absence of a specific finding was not intentional).

It was significant to the trial court that the existing cedar fence was a split-rail fence. The trial court stated: "Split rail wouldn't do anything." (RP Oral Decision 02/11/16, p. 19, lines 5-6). With all due respect to the trial court, whether the fence was split-rail or not split-rail is irrelevant. The sales flyer states "cedar fence". It does not specify whether the cedar fence is split-rail or not split-rail. It was error for the trial court to conclude that because the cedar fence was a split-rail fence that it somehow ceased to become a fence. The Schumachers got a cedar fence. There was no breach of contract.

3. Did the Schumachers waive their contractual right to a cedar fence? Yes

Arguing in the alternative, even if the Schumachers had a contractual right to a new cedar fence that was not split-rail and even if they did not receive a cedar fence, this claim was waived by the inspection addendum, which provides that failure of the buyer to object shall result in seller not being "obligated to make any repairs or modifications whatsoever AND THIS CONTINGENCY SHALL BE

DEEMED WAIVED." (FOF 15; Ex. 1). TGC constructed a pre-stained wood fence (not a cedar fence) in the front of the house and which ran along the side of the house. (FOF 24). The Schumachers visited the home on approximately 9-10 occasions prior to closing. (FOF 25). After all of these informal visits, the Schumachers participated in a formal walk-through just prior to closing. (FOF 28). The Schumachers *never once* objected to the pre-stained wood fence that TGC had built in front of their house. (FOF 30). They never once requested TGC to substitute that new pre-stained wood fence with a new cedar fence. (FOF 30). All of the Schumachers' requests were addressed and satisfied by TGC prior to closing. (FOF 30).

The Schumachers argue that since the inspection addendum dated October 23, 2013 contains a 10-day inspection period, there can be no waiver for anything constructed after November 2, 2013, and since there was no finding of fact as to when the fence was built, TGC's waiver argument fails. (Resp. Brief, p. 16).

The Schumachers appear to be arguing that the inspection addendum is unenforceable as to all items added to the house subsequent to November 2, 2013, because it would be unreasonable to enforce the waiver provision if the fence were built after November 2, 2013. The Schumachers never made this argument to the trial court. Neither the

Schumachers' Complaint (CP 1-8) nor the Schumacher' Trial Brief (CP 37-54) contain any reference to the 10-day inspection period or any argument that no waiver occurred because the new fence may have been built more than ten days after inspection addendum was signed. The Schumachers' argument to the trial court concerning the inspection addendum was that the inspection addendum should not bar their right to obtain certain items that the contract provided for but that they did not receive. (CP 42-43). The Schumachers did not reference or otherwise address the 10-day period in the inspection addendum to the trial court. (CP 42-43). Consequently, the trial court did not address this issue in its oral ruling when it discussed the enforceability of the inspection addendum. (RP Oral Decision 02/11/16, pp. 15-16). Accordingly, this Court should not consider this 10-day argument. RAP 2.5(a). Although appellate courts may exercise their discretion and consider a newly raised issue if it is closely related to an issue raised before the trial court, a new issue should not be considered if it would prejudice the other party. *Wilcox v. Basehore,* 189 Wn. App. 63, 90, 356 P.3d 736 (2015). If this Court were to consider this issue, TGC would be prejudiced. TGC had no reason at trial to establish the timing of the construction of the fence. TGC was never on notice that a record needed to be made concerning this issue. *See Wilson & Son Ranch, LLC v. Hintz,* 162 Wn. App. 297, 304-

05, 253 P.3d 470 (2011) ("Permitting Wilson to raise this argument for the first time on appeal would also result in a significant injustice to the Hintzes, as they were never on notice that a record needed to be made on this issue").

In the alternative, this Court should reject the argument because the trial court enforced the inspection addendum without regard to the ten-day period listed in the inspection addendum and without regard to the timing of when any given item was constructed or installed in or around their home. The trial court concluded that the Schumachers had the right to object to any item through closing of the sale on January 31, 2014.

> The Schumachers are not entitled to damages for the absence of any item listed on the sales flyer, the MLS listing ad or the spec sheet **that reasonably could have been discovered by the Schumachers or their agents prior to closing on January 31, 2014**.

(COL 8) (Emphasis added). The trial court interpreted the inspection addendum to mean, under the circumstances of the case, that the Schumachers had up until closing to object. This was a reasonable interpretation in that it is consistent with how the parties behaved. The formal walk-through occurred on January 22, 2014, three months after the REPSA was signed on October 22, 2013 and nine days before closing on January 31, 2014. (FOF 25, 28). An unchallenged conclusion of law

becomes the law of the case. *King Aircraft Sales, Inc. v. Lane,* 68 Wn. App. 706, 716, 846 P.2d 550 (1993).

The trial court enforced the inspection addendum and ruled that it had the effect of waiving "quite a few of the Schumacher's claims." (RP Oral Decision 02/11/16, p. 16, lines 14-16). The cedar fence claim should have been included with all of the other claims that were deemed waived.

F. ATTORNEY FEES AND COSTS

The Schumachers cite *Hawkins v. Diel,* 166 Wn. App. 1, 269 P.3d 1049 (2011) for the proposition that a defendant "successfully defending a portion of [the plaintiff's] suit does not make [the defendant] a prevailing party." (Resp. Brief, p. 19). The Schumachers take that line out of context. That line should be interpreted with either the words "necessarily" or "automatically" before the word "make". Otherwise, that line would mean that a substantially prevailing defendant would never be eligible for an attorney fee award, and this is not the law in Washington.[2]

In *Hawkins v. Diel,* a car drove into an apartment occupied by tenants. The landlord delayed in making repairs. The tenants sued the landlord alleging: (1) negligent infliction of emotional distress; (2)

[2] "The defendant need not have made a counterclaim for affirmative relief, as the defendant can recover as a prevailing party for successfully defending against the plaintiff's claims." *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme NW., Inc.,* 168 Wn. App. 86, 99, 285 P.3d 70 (2012).

negligent violation of landlord duties under common law; (3) violation of the Washington Residential Landlord-Tenant Act; and (4) breach of contract. *Hawkins*, 166 Wn. App. at 6. The district court awarded $2,356 to the tenants on their breach of contract claim and awarded attorney fees and costs to the tenants, but dismissed their other claims. *Id.* at 6-7. On appeal, the landlord argued that an attorney fee award to the tenants was improper because the landlord had successfully defended the tenants' other claims. *Id.* at 11. The tenants argued that the claims that the landlord prevailed on had no basis for an attorney fee award and that the only claim that a basis for an attorney fee award was the breach of contract claim and that was the claim that the tenant prevailed on. *Id.* at 11. The court accepted the tenants' argument. *Id.* at 11.

Here, the claims eligible for an attorney fee award are the breach of contract claim (the REPSA contains an attorney fee clause) and the implied warranty of habitability claim. The Schumachers agree. (Resp. Brief, p. 20). TGC substantially prevailed on the breach of contract claim (the Schumachers prevailed on only 3 out of 49 of their construction defect / breach of contract claims[3]) and TGC prevailed entirely on the implied warranty of habitability claim.

[3] See the items listed in Ex. 30 and the items listed in the "Quote from Eddy's Construction" Ex. 27, which is the first item listed in Ex. 30.

The Schumachers correctly point out that they are the only parties in whose favor an affirmative judgment was entered. (Resp. Brief, p. 19). They argue that they recovered substantial amounts of money on their claim for the garage wall masonry and the cedar fence. *Id.* at 19. "Therefore", they conclude, they "are prevailing parties". *Id.* at 19.

Their conclusion does not follow from their premises. In *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 115 P.3d 349 (2005), a subcontractor was the only party in whose favor an affirmative judgment was entered. *Id.* at 767. The award was for a substantial amount of money, namely $45,368.61. *Id.* at 767. But the court ruled that the defendant general contractor—not the plaintiff subcontractor—was the prevailing party. *Id.* at 772-73.

Considering that the Schumachers prevailed on only 3 out of 49 of their construction defect / breach of contract claims and recovered only $9,772.50[4] out of their alleged damages of $71,499.07[5], TGC was the substantially prevailing party concerning the construction defect / breach of contract claims. *Id.* at 772-73.

---

[4] COL 12 – 14; CP 112 (principal in the judgment amount is $9,772.50)

[5] Ex. 30

In its opening brief, TGC argued in the alternative that no party is entitled to attorney fees because both parties prevailed on major issues. The Schumachers argue that the Court should not consider this argument because TGC raised it for the first time on appeal. (Resp. Brief, p. 21). TGC is not raising a new issue. The issue is which party is entitled to an award of attorney fees. The possibility that neither party may be entitled to an award of attorney fees is not a new issue. Both parties argued to the trial court that they had prevailed on major issues. It is a closely related issue to the issue raised by TGC to the trial court. "If an issue raised for the first time on appeal is 'arguably related' to issues raised in the trial court, a court may exercise its discretion to consider newly articulated theories for the first time on appeal." *State v. Lazcano*, 188 Wn. App. 338, 361, 354 P.3d 233 (2015); *Wilcox v. Basehore*, 189 Wn. App. 63, 90, 356 P.3d 736 (2015) (considering an argument raised for first time on appeal because it was "closely related" to an argument made to the trial court and because the respondent "suffers no prejudice"). There would be no prejudice or any significant injustice to the Schumachers if this Court were to consider the argument that neither party is entitled to an award of attorney fees, given that the basis for such an outcome is that both sides prevailed on major issues and both sides took those positions before the trial court.

G. CONCLUSION

The Schumachers are not entitled to damages for construction defects. Because of the existence of caveat emptor and the absence of any express or implied warranty, the only conceivable claim for the Schumachers concerning the construction defects is breach of contract. That claim fails because TGC did not breach the contract. The Schumachers are not entitled to damages concerning the cedar fence. Finally, the Schumacher should not have been awarded attorney fees and costs. The trial court erred and should be reversed.

Dated this 2nd day of August, 2016

LINVILLE LAW FIRM, PLLC

David E. Linville, WSBA #31017
Attorney for Appellant T. Garrett Construction Incorporated

PROOF OF SERVICE

I certify that I sent a copy of this Reply Brief to attorneys Joseph T. G. Harper and to Christopher M. Constantine on August 1st, 2016 via email to harperlawoffices@comcast.net and ofcounsl1@mindspring.com per our previous agreement concerning service of pleadings via email.

Dated this 2nd day of August, 2016

LINVILLE LAW FIRM, PLLC

David E. Linville, WSBA #31017